84-861

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly concluded that the collectively bargained rules governing the use of containers in the shipping industry, in their application to certain widespread practices of motor carriers and warehouses, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B) and 158(e).

PARTIES TO THE PROCEEDING

The decision of the court of appeals was issued in four consolidated cases seeking review or enforcement of decisions of the National Labor Relations Board. The International Longshoremen's Association, AFL-CIO (ILA) appeared as petitioner in one of those cases, intervenor in another, and respondent in the other two; also appearing as petitioner, intervenor, and respondent was the Council of North Atlantic Shipping Associations. Additional respondents were the ILA Hampton Roads District Council; the ILA Atlantic Coast District Council; the ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; the Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; and Marine Terminals, Inc. American Trucking Association, Inc., Tidewater Motor Truck Association, and the New York Shipping Association appeared as petitioners and intervenors below. The International Association of NVOCCs, Florida Custom Brokers and Forwarders Association, Inc., Twin Express, Inc., and International Container Express, Inc., were petitioners below. Houff Transfer, Inc.; the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; the American Warehousemen's Association; and San Juan Freight Forwarders, Inc., were intervenors below. Under Rule 19.6 of the Rules of this Court, all of these parties are respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board (Pet. App. 35a-64a) and the decision of the administrative law judge (Pet. App. 65a-258a) are reported at 266 N.L.R.B. 230.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. A petition for rehearing was denied

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[1] "Pet. App." refers to the appendix filed jointly by the petitioners in Nos. 84-677, 84-684, 84-691, and 84-696. "C.A. App." refers to the joint appendix filed in the court of appeals.

on July 31, 1984 (Pet. App. 31a-34a). On October 19, 1984, the Chief Justice extended the time in which to file a petition for a writ of certiorari to November 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
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> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title:

> *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *.

Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void * * *.

STATEMENT

This case concerns the Rules on Containers, which are part of collective bargaining agreements between the International Longshoremen's Association (ILA) and shipping industry employers. The Rules on Containers were adopted in response to a technological innovation in the shipping industry and are designed to deal with the impact of containerization on longshoremen's work. In *NLRB* v. *ILA* (*ILA I*), 447 U.S. 490 (1980), this Court vacated two decisions of the National Labor Relations Board that had concluded that the Rules on Containers and their enforcement constitute secondary activity prohibited by Sections 8(b)(4) and 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4) and (e). On remand, the Board consolidated those two proceedings with seven other proceedings concerning the Rules on

Containers. The Board concluded that the Rules violate the NLRA in their applications to a widespread practice known as shortstopping and to traditional warehousing practices. The Board also concluded that the Rules are otherwise lawful. The court of appeals, disagreeing with the Board in part, held that the Rules are lawful in all respects.

A. The Factual Background

1. *Containerization and the Shrinkage of Longshore Work*

Containerization is a technological innovation that permits individual pieces of cargo to be packed into a large, reusable metal container that can be moved on and off an ocean vessel unopened. Containers range in length from 20 to 40 feet and are capable of holding upwards of 30,000 pounds of freight. They can be fixed to a truck chassis and transported unopened to and from the ocean pier, and they fit into the holds of specially designed vessels known as containerships. Pet. App. 45a; *ILA I*, 447 U.S. at 494. The loading of containers, by whomever performed, is known in the industry as "stuffing"; the unloading of containers is known as "stripping." *ILA I*, 447 U.S. at 497. Containers that contain export cargo belonging to more than one shipper or import cargo destined for more than one consignee are known as LCL (less-than-container load) or LTL (less-than-trailer load) cargo. Containers that contain export cargo from only one shipper or import cargo destined for only one consignee are known as FSL (full shipper's load) containers. *Id.* at 496-497.

Before containerization, longshoremen employed by steamship companies performed the work of loading and unloading cargo on the piers. In the Atlantic and Gulf ports concerned in this case, longshoremen are

represented by the International Longshoremen's Association (ILA). The longshoremen handled export cargo by moving it from the tailgate of the delivery truck at the pier into the hold of the vessel, using forklifts and slings or hooks; they performed this work in reverse in the unloading of import cargo. The process included intermediate steps such as storage, sorting, checking, placing cargo on pallets, cargo repair, and carpentry. Pet. App. 4a-5a, 46a; C.A. App. 562-564, 630-631, 1168-1172, 1306-1307, 1336-1337, 1402-1404, 1442-1445, 1686-1688; *ILA I*, 447 U.S. at 495.

The growth of containerization [2] greatly reduced the traditional loading and unloading work performed by longshoremen. Containers eliminated the need for piece-by-piece (or "break-bulk") cargo handling at the pier. *ILA I*, 447 U.S. at 495-496; Pet. App. 46a. Export containers were stuffed before they reached the pier; import containers were stripped after they left the pier. With respect to containerized cargo, it remained only for longshoremen to take the containers on and off the vessel. Longshoremen continued to load and unload conventional cargo vessels in the traditional manner, to stuff containers for cargo that arrived at the pier piecemeal, and to strip containers for cargo scheduled to be picked up at the pier directly. Pet. App. 46a-47a; C.A. App. 566-567, 602, 635-636, 640-642, 677.

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[2] The first containership appeared in 1957, and the use of such ships, growing gradually at first, dramatically increased in the late 1960s and early 1970s (Pet. App. 5a-9a, 96a, 98a-100a & n.26; C.A. App. 634-635, 1457, 1486-1487; *ILA I*, 447 U.S. at 497 n.11).

2. *Cargo Handling by Motor Carriers, Employees at Inland Warehouses, and Freight Consolidators, Before and After Containerization*

Shipping companies own or lease virtually all containers carried on ocean vessels. They furnish these containers principally to the shippers (or consignees) themselves and to three kinds of firms that serve as agents for the shippers and consignees: motor carriers, warehouses, and freight consolidators.

a. Motor carriers operate between inland points and the motor carrier's terminal in the pier area and also between the terminal and the pier (Pet. App. 46a, 54a, 132a-133a; C.A. App. 256, 318-321, 427). Before containerization, the motor carrier picked up import cargo break-bulk from the pier. Most commonly, the driver returned to the truck terminal in the pier area where the motor carrier's employees unloaded the trailer and then loaded the cargo into different trucks for delivery to the consignees (C.A. App. 320-321, 427). Cargo picked up at the pier from a single shipper for a single nonlocal consignee that filled one truck was brought to the terminal, where it might be reloaded for several reasons—to achieve weight distribution for a long haul run, to meet road safety standards, to allow sequential unloading, or to permit delivery of the cargo to diverse inland locations in accordance with the consignee's directions (Pet. App. 54a; C.A. App. 320-321, 427).

Motor carriers now haul empty and filled containers between the pier and their off-pier terminals, as well as to various other inland locations including warehouses and facilities of shippers and consignees. A carrier that handles import FSL containers—as many do exclusively or predominantly (C.A. App. 253, 460, 500)—picks up a sealed FSL import container from the pier, hitches the container to the

truck, and hauls it to the motor carrier's off-pier terminal (C.A. App. 322, 459-460, 1089-1091, 1116-1118, 1125-1127, 1135-1136, 1144). At the off-pier terminal, the carrier may treat the container in the same way that it previously treated a truckload of break-bulk cargo picked up from the pier and destined for a single consignee—it may either leave the container intact for delivery to the consignee or strip the container and reload the cargo into an over-the-road truck trailer. The practice of stripping FSL loads prior to delivery to a single consignee is known as "shortstopping." Pet. App. 27a, 54a-55a, 133a-134a; C.A. App. 253, 320-321, 459-463, 488-491, 506-507, 1094-1095, 1143.

Trucking companies shortstop containers for a variety of reasons arising from the requirements of surface transportation and at no extra charge to the consignee. Like trailer loads of break-bulk cargo picked up from the pier in the pre-container era, fully loaded containers may exceed state highway weight limitations or be overloaded, unbalanced or otherwise unsuitable for hauling long distances (Pet. App. 55a, 134a; C.A. App. 258-259, 494, 509, 1088, 1094-1095, 1096, 1098-1100, 1111-1112, 1130, 1146-1147). Containers also may be incompatible with conventional truck tractor equipment used for long-distance hauling. It is often more efficient to consolidate the contents of two 20-foot containers into one 45-foot truck trailer. And by using their own trailers instead of containers, trucking companies also avoid maintenance costs and per diem charges on containers. Pet. App. 55a, 134a; C.A. App. 253-254, 258-259, 323, 433-434, 470-471, 493-494, 508-511, 1096, 1098-1099, 1112, 1118-1120, 1130, 1137-1139, 1146-1147.

b. Inland warehouses store cargo for indefinite periods and distribute the cargo according to the

owner's instructions; this enables the owner to meet the shifting or unexpected demands of its customers or the branches of its operation without having the cargo shipped to its central plant unnecessarily. Importers arrange with the warehouse to pick up cargo at the pier. Upon delivery of import cargo to the warehouse, warehouse employees, before containerization, unloaded the truck, sorted, segregated, and palletized the cargo, and placed it in designated storage areas. There it was stored until the consignee instructed the warehouse to distribute or deliver all or a portion of the cargo either to the consignee or to a designated customer or branch outlet of the consignee (Pet. App. 55a-56a; C.A. App. 467-469). In some cases, stored crates or cases of cargo were broken down and individual pieces of merchandise were delivered as directed by the consignee (C.A. App. 466-467).

Since containerization, warehouse employees, instead of stripping truck trailers filled with import cargo, have stripped containers that have been picked up from the pier and delivered unopened to the warehouse. The warehouse employees then frequently perform the same tasks as before containerization—they sort, label, and place the cargo on pallets in order to store it in a designated location to await the owner's instructions on distribution (C.A. App. 431-432, 467, 535-536).

Some warehouses also provide warehousing services for export cargo sent by a single shipper. For example, before containerization, one warehouse stored small lots of cargo for later consolidation and shipment with additional cargo sent by the same shipper (Pet. App. 144a n. 58; C.A. App. 469-470). Another warehouse picked up merchandise from a customer's manufacturer and assembled truckloads of cargo for

each of the customer's overseas branch outlets (Pet. App. 144a n.58; C.A. App. 385-386). Since containerization, warehouses have continued to perform such services, although now they combine designated stored cargo for shipment in FSL containers (Pet. App. 144a n.58; C.A. App. 376, 389-390). In connection with stuffing FSL export containers, warehouses also may perform specialized services for handling and packing cargo (Pet. App. 126a n.46; C.A. App. 500).

c. Freight consolidators combine goods of various shippers in a single shipment at an off-pier terminal and deliver the container enclosing that shipment to the pier (Pet. App. 52a-53a, 124a n.43; *ILA I*, 447 U.S. at 496 n.8). The extensive scale of off-pier stripping and stuffing—particularly the operations of freight consolidators known as non-vessel operating common carriers (NVOCCs)—has been encouraged by a rate structure under which shipping companies charge less for transporting a shipper's cargo when it has been combined with other shippers' cargo in a single container than they charge for transporting that same cargo delivered to the pier in break-bulk fashion to be stuffed into a container at the pier (Pet. App. 127a-129a; C.A. App. 267, 326, 352, 443, 446, 498, 529, 544, 603-604, 865-871, 1316, 1333-1334, 2491-2496). In addition, shippers frequently seek to avoid having cargo handled in break-bulk fashion at the pier because, among other things, there is a greater danger of pilferage and damage (see *ILA I*, 447 U.S. at 494).

3. *The Rules on Containers*

The ILA, representing longshoremen in Atlantic and Gulf ports, and the Council of North Atlantic Shipping Associations (CONASA), an organization of shipping associations whose members are steam-

ship companies and stevedoring companies operating out of North Atlantic ports, have negotiated a series of collective bargaining agreements incorporating provisions known as the Rules on Containers. Those agreements have been treated as master agreements and have been adopted by the ILA and multi-employer associations in every major Atlantic and Gulf port (Pet. App. 47a, 96a-97a & n.23; C.A. App. 1084, 1157, 1189).[3]

The Rules require that, with one exception, all containers (whether LCL or FSL) that would otherwise be stuffed or stripped within 50 miles of the port by employees other than those of the beneficial owner of the cargo must be stuffed or stripped by ILA-represented longshoremen on the pier. The exception is for FSL import container cargo where the cargo is to be warehoused at a bona fide warehouse for a minimum of 30 days. The Rules also state that trucking stations within the 50-mile geographic area used for unloading of containers do not constitute bona fide public warehouses (Pet. App. 103a, 232a-233a).[4]

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[3] For the purposes of this case, the Rules in their essentially final form appeared in the 1974-1977 agreement negotiated by ILA and CONASA, as clarified by a restatement pertaining to warehousing of goods issued in 1975 (Pet. App. 87a, 103a-104a, 106a n.29, 222a-234a). The text of the Rules reprinted in the appendix to the Court's opinion in *ILA I* (447 U.S. at 513-522) is the 1974-1977 version as amended by the 1975 clarifying statement, and it it resembles in all significant respects the Rules as incorporated in the parties' agreement negotiated in 1980 (Pet. App. 103a-104a, 237a-238a).

For a discussion of the history of negotiations over the use of containers and of the versions of the Rules included in collective bargaining agreements prior to 1974, see *ILA I*, 447 U.S. at 497-499.

[4] The Rules do not apply to containers loaded or discharged outside the 50-mile geographic area, loaded or discharged at a

The Rules forbid the signatory steamship companies from supplying containers to any facility operating in violation of the Rules. The Rules also require steamship companies that fail to comply with the Rules and that release or handle a container that should have been stuffed or stripped on the pier by ILA longshoremen to pay liquidated damages of $1,000 per container into the Container Royalty Fund. Pet. App. 11a, 47a, 103a, 228a-229a.

4. *Applications of the Rules to the Handling of Containerized Cargo in the Cases Consolidated Before the Board in this Proceeding*

In the cases before the Board in this proceeding, the Rules were enforced, beginning in February 1973, with respect to containers released to NVOCCs operating within 50 miles of the Ports of New York, Baltimore, and Hampton Roads; with respect to carriers shortstopping FSL containers at terminals within 50 miles of the ports of Baltimore and Hampton Roads; and with respect to warehouses stuffing and stripping containers within 50 miles of the ports of Philadelphia and Baltimore.[5]

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qualified consignee's facility by its own employees, export containers loaded with cargo of a single manufacturer, containers of personal household goods, mail, and military personnel's personal effects, or containers carrying cargo in the intercoastal trade (Pet. App. 225a-226a).

[5] Between 1973 and 1979, the Board's General Counsel issued unfair labor practice complaints alleging that the Rules violated provisions of the National Labor Relations Act and obtained injunctions against their enforcement in several ports. *Balicer* v. *ILA*, 364 F. Supp. 205 (D.N.J.), aff'd without opinion, 491 F.2d 748 (3d Cir. 1973) (New York); *Balicer* v. *ILA*, 86 L.R.R.M. (BNA) 2559 (D.N.J. 1974) (New York); *Humphrey* v. *ILA*, 548 F.2d 494, 499 (4th Cir. 1977) (Hampton Roads); *Humphrey* v. *ILA*, No. 4-75-1395 (D. Md. Mar. 25,

a. *Penalties for shortstopping*

As recounted in *ILA I*, Houff Transport, Inc. (Houff) and Associated Transport, Inc. (Associated) were common carriers that operated motor freight terminals within 50 miles of the Ports of Baltimore and Hampton Roads. *ILA I*, 447 U.S. at 501; *ILA* (*Associated Transport, Inc.*), 231 N.L.R.B. 351, 358 (1977), enforcement denied, 613 F.2d 890 (D.C. Cir. 1979), remanded, 447 U.S. 490 (1980). In 1974, employees of Houff and Associated stripped containers they had picked up at piers in the nearby ports and loaded the cargo into trailers for over-the-road transport to the consignees; in the case of Houff, its truckdriver had specifically noted that the containers were dangerously overloaded. *ILA I*, 447 U.S. at 501; *Associated Transport*, 231 N.L.R.B. at 362; Pet. App. 176a. The shipping companies that leased the containers in question were subsequently assessed liquidated damages under the Rules for each container, and when Houff and Associated refused to indemnify the companies for the fines, each carrier was threatened with cancellation of the agreement under which it leased containers. *Ibid.*

b. *Pressure to eliminate stripping of FSL containers by warehouse employees integral to distribution and storage of imported merchandise*

The Terminal Corporation is a bona fide warehouse within the meaning of the Rules operating within 50

1976) (unreported) (Baltimore); *Hirsch* v. *ILA*, No. 79-2022 (E.D. Pa. June 12, 1979) (enjoining enforcement of 30-day warehousing rule; Philadelphia). After *ILA I*, all of those injunctions were vacated except for one issued in Philadelphia. The ILA and the shipping companies agreed that the Rules would be enforced in all ports except Philadelphia beginning January 1, 1981 (Pet. App. 239a).

miles of the port of Baltimore. In 1978 and 1979, it received FSL containers of firebrick from a German manufacturer; according to the usual practice, German employees stuffed the containers, ILA labor in Baltimore unloaded them from the ship, and Terminal drivers attached the containers to tractors and drove them back to the warehouse, where other Terminal employees stripped the containers, separating out the firebrick already sold for distribution and storing the rest for future distribution pursuant to the instructions of the manufacturer. Stored firebrick was sometimes distributed in less than 30 days and sometimes held for more than 30 days, depending on the orders. Pet. App. 179a; *ILA* (*Terminal Corp.*), 250 N.L.R.B. 8, 10-11 (1980).

In March 1979, agents of ILA, its Atlantic Coast District, and two ILA locals induced members employed by a stevedoring contractor to engage in a temporary refusal to release containers to Terminal because the shipping papers did not contain the 30-day warehousing language required by the Rules. Pet. App. 179a-180a; *Terminal Corp.*, 250 N.L.R.B. at 11.

c. *Pressure to eliminate stuffing of FSL containers by warehouse employees integral to special services respecting goods for export by a single shipper*

Beck Arabia, Ltd., is engaged in various construction projects in Saudi Arabia; from its offices in Texas it orders a variety of items from a number of American suppliers for use in the Saudi projects. Under an arrangement between Beck and Shipside Packing Company, a firm that maintains a general warehouse and packing operation near the Port of Baltimore, Beck's suppliers ship the items to Shipside, which stores them temporarily until receiving

orders from Beck to consolidate particular groups of items for shipment on specified vessels. Shipside employees then stuff FSL containers for delivery to the pier by contract motor carriers. In August 1978, an agent of an ILA local induced ILA members employed by a stevedoring company to refuse to load the containers onto a ship because the ILA regarded their stuffing by non-ILA labor to be a violation of the Rules. Pet. App. 181a-182a; *ILA Local 953 (Beck Arabia, Ltd.)*, 245 N.L.R.B. 1325 (1979).

d. *Other instances of enforcement of the Rules*

On a number of occasions, enforcement of the Rules has been sought with respect to stripping or stuffing of LCL containers by NVOCCs or other freight consolidators. Pet. App. 175a-176a; *ILA (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), enforced, 537 F.2d 706 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); *ILA Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. 1320 (1979); *ILA (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978), enforcement denied, 613 F.2d 890 (D.C. Cir. 1979), remanded, 447 U.S. 490 (1980). ILA affiliates have exerted coercive pressures with respect to the stripping of cold storage containers by warehouse employees who performed services similar to those performed by ILA labor in stripping containers in pier-side cold storage facilities (Pet. App. 176a-179a); *ILA Local 1242 (Hill Creek Farms, Inc.)*, Board Case Nos. 4-CC-1133, 4-CE-55 (June 27, 1979)). ILA coercive pressures have also been directed at the stuffing of export containers by warehouse employees who performed no related specialized warehousing services (Pet. App. 179a-181a; *Terminal Corp.*, 250 N.L.R.B. at 11-12).

B. *ILA I*

The Board initially concluded that the Rules violated Sections 8(b)(4)(ii)(B) and 8(e) in all their applications because their objective was not to preserve the work of bargaining unit employees but to acquire work that had been performed by employees outside the bargaining unit. See *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 517 (1977); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 644-645 (1967). In *ILA I*, this Court ruled that the Board's definition of the work at issue—" 'the off-pier stuffing and stripping of containers' " (447 U.S. at 506; citation omitted)—was "incorrect as a matter of law" (*id.* at 507) because the Board "focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping" (*ibid.*). The Court held that "the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work" (*ibid.*).

The Court declined to address the question whether the Rules have a valid work preservation objective, however, because the Board had "not had an opportunity to consider th[is] question[] in relation to a proper understanding of the work at issue." 447 U.S. at 511. The Court explained the issue as follows (*id.* at 510-511; footnotes omitted):

> [The ILA and the shipping companies] assert that the stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier. [The freight consolidators, truckers, and warehouses], on the other hand, argue that containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and em-

ployees of motor carriers has been completely eliminated.

These questions are not appropriate for initial consideration by reviewing courts. They are properly raised before the Board, whose determinations are, of course, entitled to deference. * * * We emphasize that neither our decision nor that of the Court of Appeals implies that the result of the Board's consideration of this case is foreordained. Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board will be free to determine whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are "tactically calculated to satisfy union objectives elsewhere," *National Woodwork*, 386 U.S., at 644.

The Court emphasized the limited nature of its ruling (447 U.S. at 511 n.26): "Our holding, we repeat, is that the Board's definition of the work in controversy was erroneous as a matter of law. The question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand."

C. The Board's Decision and Order on Remand

On remand, the Administrative Law Judge concluded that the Rules were invalid insofar as they applied to shortstopping and container stripping and stuffing integral to traditional warehousing practices. The ALJ concluded that the Rules were valid in other respects. The ALJ explained his ruling with respect to shortstopping as follows (Pet. App. 133a-135a; emphasis in original):

> By virtue of this practice, FSL containers are stripped at truck stations and terminals within the geographic area covered by the Rules for

a variety of reasons associated with the economics of *surface* transportation. * * * Over-the-road tractor-trailers are up to 45 feet in length, and therefore have a capacity exceeding that of the modern containers. Interstate carriers will upon occasion strip the smaller containers, consolidate the cargo they contain with other goods destined for the same area and load the consolidated cargo into a 45 foot tractor-trailer. In addition, many interstate carrier systems interchange trailers at inland points for use within a multistate system. Containers have no utility within that system and if transported over the road, would have to be hauled empty back to the port area on a "dead head" run. Short-stopping may also occur because containers may not have [been] loaded in a safe manner or in compliance with State laws regulating safety of operation on the highways. Other grounds for short-stopping include the fact that [a] motor carrier is required to pay *per diem* charges on containers, a practice which is wasteful while empty trailers sit idle and are subject to utilization without additional operating cost.

Based on the foregoing, it appears that the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience. To the extent that containers are handled for such purposes, and not under direction or for the benefit of shippers, consignees or their agents, short-stopping has no relevance to the marine leg of the intermodal network. Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, it is work assumed for a different purpose, and in a different segment of the transportation industry. Short-stopping is simply a

carrier oriented, as distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work.

The ALJ similarly determined that the Rules were unlawful as applied to traditional warehousing practices (Pet. App. 138a):

> [T]he public inland warehouse has always provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand.
>
> To this extent, warehousing practices did not change after containerization. Instead of stripping truck-trailers upon arrival at the warehouse docks, the container was stripped.

The ALJ upheld the Rules, however, insofar as they applied to freight consolidators, including both NVOCCs and warehouses that function not in their traditional role but as freight consolidators (Pet. App. 123a-132a, 139a-145a). The ALJ remarked that "there is some logic to the notion that if consolidation in containers is to be performed within the port area, it just as conveniently could be performed on the pier by longshoremen" (*id.* at 131a) and concluded that insofar as the Rules claim the offshore stripping and stuffing performed by NVOCCs within 50 miles of the port, they "constitute[] a rational effort to return to the piers, work diverted by inducements and * * * technology" (*id.* at 129a-130a).[6]

[6] The ALJ also concluded (Pet. App. 150a-172a) that the shipping companies, through their control of the containers, had sufficient control over the assignment of the work sought by the ILA to satisfy the " 'right-of-control' test of *Pipefitters*"

The Board "agree[d] with the Administrative Law Judge's findings and conclusions" (Pet. App. 57a). The Board explicitly defined "the work in dispute" as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with ILA." *Ibid.* The Board noted that "no new work was created for consolidators after containerized shipping began." *Id.* at 59a. Instead, a "large part of the longshoremen's traditional work was diverted away from the pier to the consolidators." *Ibid.* The Board accordingly concluded that "the ILA had a lawful work preservation objective in claiming this work under the Rules." *Ibid.*

The Board modified the ALJ's rationale for concluding that the Rules were unlawful as applied to shortstripping and traditional warehousing functions, but it agreed with his conclusion (*ibid.*):

> The Administrative Law Judge also found that no new work was created by containerization for trucking and warehousing employees. Further, in contrast to consolidation, no work was diverted away from the pier to the truckers and warehouses as a result of containerization, at least as to those shortstopping and traditional warehousing services involved where he found violations. Rather, after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated. While we agree with the Administrative Law Judge's conclusion that the ILA had an unlawful work ac-

(*ILA I*, 447 U.S. at 504). Neither the Board nor the court of appeals overturned this determination. See Pet. App. 26a.

> quisition objective in claiming this loading and unloading work * * *, we do not agree with his reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization. Instead, we point to the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process. * * *

D. The Decision of the Court of Appeals

The court of appeals held that "the Rules are valid in all respects" (Pet. App. 4a). It accordingly sustained the Board's order insofar as it upheld the lawfulness of the Rules, but denied enforcement of the order insofar as it held unlawful the Rules' application to shortstopping and certain warehousing practices.

The court held (Pet. App. 27a) that the Board erred as matter of law when it concluded that, because the Rules as applied to shortstopping and traditional warehousing practices "sought to preserve for the longshoremen work that had been rendered superfluous by the change in technology and not work that had been diverted to others," the Rules violated the Act in those applications. The court of appeals acknowledged that containerization had essentially not altered the truckers' work and had made the longshoremen's work unnecessary (*ibid.*):

> Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. * * * With containerization, the off-pier work of the shortstopping truckers remains essentially unchanged except that they unload

> cargo from containers instead of motor trucks. And with containerization, of course, the work formerly performed by the longshoremen has been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station.

Nonetheless, the court of appeals ruled that the Board's conclusion that the application of the Rules to shortstopping does not have a valid work preservation objective was erroneous for the following reason (Pet. App. 27a-28a):

> [T]he Board conspicuously failed to ground this conclusion * * * in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the "work acquisition" tag on the Rules in these two instances without a finding that the longshoremen acquired anything. * * * [O]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate. [7]

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[7] The court of appeals did not discuss in detail the application of the Rules to traditional warehousing practices but as-

Three judges of the court of appeals voted to rehear the case en banc (Pet. App. 33a).

REASONS FOR GRANTING THE PETITION

The Rules on Containers are incorporated in the collective bargaining agreements in effect at every major Atlantic and Gulf port. In *ILA I*, this Court noted the importance and practical significance of the question whether the Rules are lawful. 447 U.S. at 493; see *id.* at 494-496. The Rules determine the extent to which shippers can take advantage of the potentially enormous savings made possible by the growth of containerization (*ibid.*); in addition, controversies over the treatment of containers—controversies which are made more problematic by the uncertain legal status of the Rules—have been a frequent cause of industrial strife in the shipping industry (see Pet. App. 97a, 98a, 99a, 101a, 103a-104a).

The Court should grant this petition and the other petitions seeking review of the court of appeals' decision [8] in order to resolve this important issue. While there is no conflict among the circuits, as there was at the time of *ILA I*, there is a substantial likelihood that no other court of appeals will have an opportunity to address the validity of the Rules, and that therefore no other case will come to this Court in

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serted that "the Board made the identical error of law with regard to both shortstopping and warehousing" (Pet. App. 27a n.8).

[8] See *American Warehousemen's Ass'n* v. *ILA*, No. 84-677 (incorrectly titled *American Trucking Ass'ns, Inc.* v. *ILA*); *International Brotherhood of Teamsters* v. *ILA*, No. 84-684; *International Ass'n of NVOCCs* v. *NLRB*, No. 84-691; and *American Trucking Ass'ns, Inc.* v. *ILA*, No. 84-696. We intend to file responses to these petitions in which we will not oppose the granting of certiorari.

which that issue is presented. In addition, the holding of the court below that the Rules are lawful as applied to shortstopping and traditional warehousing work cannot be reconciled with this Court's opinion in *ILA I*; and because of the prevalence of those practices, that aspect of the decision alone affects many persons and is of considerable economic importance. Further review is therefore warranted.

1. a. The court of appeals' decision, insofar as it overturns the Board's determination, rests on a fundamental misunderstanding of both the "work preservation" doctrine and this Court's decision in *ILA I*. Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), by its terms, prohibits employers and unions from agreeing that the employer will cease doing business with another person. The Rules on Containers, at first blush, appear to fall within this proscription; they require shipping companies not to supply containers to other persons, unless those persons permit the containers to be stuffed and stripped by employees represented by the ILA under the circumstances specified in the Rules. But this Court has held that Section 8(e) applies only to secondary activity, not to activity serving a legitimate primary purpose. See *ILA I*, 447 U.S. at 504; *Pipefitters*, 429 U.S. at 517; *National Woodwork*, 386 U.S. at 620, 635. Similarly, if a union applies pressure in an effort to enforce a provision of a collective bargaining agreement that violates Section 8(e), its activity violates Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B), which also proscribes only secondary activity.

"Among the primary purposes protected by the Act is 'the purpose of preserving for the contracting employees themselves work traditionally done by them.'" *ILA I*, 447 U.S. at 504, quoting *Pipefitters*,

429 U.S. at 517; see *National Woodwork*, 386 U.S. at 629. The Board concluded that the Rules have a valid work preservation objective as applied to the freight consolidators because their work "is functionally equivalent to [the longshoremen's] former work of handling break-bulk cargo at the pier." *ILA I*, 447 U.S. at 510 (footnote omitted). Formerly, break-bulk cargo was delivered to the pier, where longshoremen placed it in the hold of the ship; now, break-bulk cargo is delivered to the freight consolidator, which places it in a container that will be transferred to the hold. The Board concluded that containerization (and other factors) caused this work to be moved off the pier but did not eliminate it; the longshoremen were accordingly entitled to claim it back. See Pet. App. 58a-59a.

The Board also concluded, however, that short-stopping and stuffing and stripping integral to traditional warehousing practices are not "work traditionally done by" longshoremen. Instead, these practices constitute work traditionally done by other employees—the employees of motor carriers and warehouses—for purposes quite distinct from the traditional purposes of longshoremen's work. Specifically, this work is done for purposes integrally connected to warehousing or to movement by motor carrier, such as the need to satisfy weight or balance requirements or to obtain the most efficient use of trucks and trailers. Longshoremen have never performed loading or unloading work for these purposes, and the Board concluded that the longshoremen could not claim this work just because their work may physically resemble it and require the same skills. See Pet. App. 134a-137a. Thus, these applications of the Rules are unlawful because this is "a case of a union seeking to restrict by contract * * * an employer

with respect to the [third parties with whom it deals], for the purpose of acquiring for its members work that had not previously been theirs." *National Woodwork*, 386 U.S. at 648 (Harlan, J., concurring). See also *Pipefitters*, 429 U.S. at 530 n.16.

b. The court of appeals rejected the Board's analysis for one reason alone: the Rules were lawful, the court held, because they did not "deprive the truckers and warehousemen of *their* off-pier work" (Pet. App. 27a; emphasis in original). The court of appeals reasoned that the longshoremen cannot be said to have unlawfully "acquired" work unless they acquired it from the other employees, thereby leaving the others with less work. There are at least three errors in the court of appeals' reasoning.

First, there is no basis for the court of appeals' gloss on the "work preservation" doctrine; that doctrine does not refer to the extent to which others are deprived of work. As this Court remarked in a different context in *ILA I*, "[t]he effect of work preservation agreements on the employment opportunities of employees not represented by the union * * * is * * * irrelevant to the validity of the agreement" (447 U.S. at 507 n.22). This Court has never suggested that a union is entitled to engage in secondary activity in order to acquire new work that did not traditionally belong to its employees so long as it does not deprive other employees of their work. On the contrary, as the name of the work preservation doctrine suggests, and as the Court emphasized in *ILA I* itself, the question is whether the work claimed by the bargaining unit employees is sufficiently related to the work they have traditionally performed. "[T]o determine whether an agreement seeks no more than to preserve the work of bargaining unit

members, the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work" (*ILA I*, 447 U.S. at 507 (footnote omitted)). See *id.* at 510 & n.24 (The legality of the agreement "will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns."); *National Woodwork*, 386 U.S. at 646 (upholding Board determination that "the conduct of the Union * * * related solely to preservation of the traditional tasks of" bargaining unit employees).

Second, the court of appeals overlooked the fact that this Court in *ILA I* specifically contemplated that the Board might find the Rules unlawful because "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by * * * longshoremen * * * has been completely eliminated." 447 U.S. at 510-511. The Board explicitly found, with respect to shortstopping and traditional warehousing practices, that the longshoremen's work has been eliminated. See Pet. App. 59a-60a. For example, as the court of appeals itself recognized (*id.* at 27a), because an import FSL container can be attached to a truck chassis and taken on the road to the owner, the work of the longshoremen—unloading the break bulk cargo from the ship and placing it at the head of the pier for collection by a truck—has been eliminated. The fact that the motor carrier might, for its own purposes, rearrange its truck loads, stripping the container in the process—that is, shortstopping—does not alter the fact that the longshoremen's work has been eliminated.

The court of appeals did not explain how its conclusion can be squared with this Court's statement

about the elimination of work in *ILA I* and the Board's finding that certain work of the longshoremen had been eliminated. This Court, in suggesting that the Board might find that the Rules do not serve a valid work preservation objective because the longshoremen's work had been eliminated, did not intimate that the Board must also find that the Rules deprive other employees of work; an agreement that attempts to regain for a bargaining unit work that has been eliminated by technological innovation will not necessarily deprive other employees of work.

Finally, the court of appeals simply assumed that, in fact, the Rules have no effect on the employees of motor carriers engaged in shortstopping or of warehouses engaged in traditional warehousing practices. In making this assumption, however, the court of appeals failed to give the proper deference to the Board's determination that the longshoremen's work had been eliminated and to the finding of the ALJ, upheld by the Board, that the work the longshoremen were seeking to acquire was traditionally that of other employees. Pet. App. 57a-59a. Moreover, the court of appeals' assumption ignores the economic realities underlying the Board's determination that the longshoremen's work had been eliminated. The court assumed that enforcement of the Rules would simply reestablish an initial, duplicative break-bulk handling by longshoremen and leave the inland work patterns of truckers and warehouses unaffected. But break-bulk handling is labor intensive and costly, and a second break-bulk handling creates an additional risk of lost or damaged goods. Any process requiring a second such handling therefore suffers a significant economic disadvantage; this is precisely why containerization grew in the first place. See 447 U.S. at 494-495.

The more reasonable assumption, therefore, is not that the longshoremen will do duplicative work but that the industry will develop practices that avoid an unnecessary break-bulk handling. For example, facilities at the pier might be modified so that longshoremen can perform the integrated tasks previously performed by truckers and warehouse employees—in which event the longshoremen would have directly deprived the other employees of their work, contrary to the court of appeals' assumption. Alternatively, if it is possible—which it will not always be (see C.A. App. 494, 509, 1094, 1112)—cargo might be diverted to truck terminals and warehouses beyond the 50-mile limit covered by the Rules (see C.A. App. 474, 538), a step that would also deprive certain motor carrier and warehouse employees of work.

2. As we have noted, and as the Court recognized in *ILA I*, the question whether the Rules are valid is of great economic importance to the shipping industry and to those who rely on it. Moreover, a definitive resolution of the validity of the Rules will promote stability in the collective bargaining process in the shipping industry.[9] While this petition concerns only certain applications of the Rules, other petitions for a writ of certiorari have been filed seeking review of the judgment of the court of appeals insofar as it upheld the Board's determination that other applications of the Rules were lawful. See page 22 note 8, *supra*.

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[9] Further litigation on the legality of the Rules on Containers has a particularly great potential for disruption in the shipping industry because the collective agreement between the ILA and industry employers provides for reopening of the entire contract anytime the Rules on Containers are declared invalid as applied. Pet. App. 237a (Rule 8).

In addition, the question presented by this petition is itself of considerable practical importance because shortstopping and the warehouse practices at issue here are widespread activities. For example, in one of the ports involved in this litigation—Hampton Roads—one of the five long-haul carriers whose practices are reflected in the record shortstopped all of its loads, and a second shortstopped 90 percent, before the Rules were enforced against them. C.A. App. 493-494, 507.

The absence of a conflict among the circuits is, in our view, not a sufficient reason for the Court to deny certiorari, in light of the economic importance of the question presented and the conflict of the decision below with this Court's rationale in *ILA I*. See this Court's Rule 17.1(c). Moreover, there is a reasonable likelihood that this case will present the only opportunity for the Court to consider the validity of the Rules. The ILA is a party to each of the collective bargaining agreements that contains the Rules. The ILA can be expected to assert in other circuits that the Board is collaterally estopped from challenging the decision of the court below that the Rules are valid as applied to shortstopping and warehousing practices.[10] See *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984). While the Board does not agree with this contention, it is not

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[10] Indeed, the ILA and a leading multi-employer group of shipping companies, the New York Shipping Association (NYSA), contending that such action would be in derogation of the court's mandate, have petitioned the court below for writs of mandamus and prohibition to prevent the Board and its General Counsel from taking any action on any new unfair labor practice charges involving application of the Rules which have been, or may be, filed. *In re ILA & New York Shipping Ass'n*, No. 84-1973 (4th Cir. filed Sept. 14, 1984).

insubstantial and may be sustained by other courts of appeals or by this Court. See *Walsh* v. *ILA*, 630 F.2d 864, 871-873 (1st Cir. 1980). In that event the Board would have no other opportunity to raise this question on the merits before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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